



SIDLEY AUSTIN LLP
1501 K STREET, N.W.
WASHINGTON, D.C. 20005
+1 202 736 8000
+1 202 736 8711 FAX

jyoung@sidley.com

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April 13, 2017

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Re: Business Data Services Proceeding, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593

Dear Ms. Dortch,

The Commission's *Draft Order*¹ is a measured and appropriately *data*-driven solution to the issues raised in this proceeding. AT&T submits this letter to address a handful of specific issues raised by the March 30, 2017 public draft Report and Order ("*Draft Order*") and in recent letters filed by Windstream and Sprint.²

First, contrary to Windstream and Sprint's claims, the Commission's decision to extend Phase II relief to transport nationwide is well-supported, and both carriers offer nothing but very brief, makeweight arguments to the contrary, which are buried at the end of their letters. That should not be surprising, because the data are overwhelmingly against them. The data collection shows that competitive providers have deployed competing transport networks in the

¹ Report and Order, *Business Data Services in an Internet Protocol Environment et al.*, WC Docket Nos. 16-143, 05-25, GN Docket No. 13-5, RM-10593 (draft) ("*Draft Order*"), available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0330/DOC-344162A1.pdf.

² Letter from Paul Margie (representing Sprint) to Marlene H. Dortch (FCC), *Business Data Services in an Internet Protocol Environment, et al.*, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593 (Mar. 22, 2017) ("Sprint 3/22 Letter"); Letter from John Nakahata (representing Windstream) to Marlene H. Dortch (FCC), *Business Data Services in an Internet Protocol Environment, et al.*, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593 (Mar. 22, 2017) ("Windstream 3/27 Letter").



Marlene H. Dortch

April 13, 2017

Page 2

overwhelming majority of locations with BDS demand.³ Most large MSAs have more than *twenty* competitive providers that have deployed fiber transport networks, and even smaller MSAs very often have more than a dozen. This pattern of numerous competitive facilities-based transport providers is consistent across all MSAs, whether they have received Phase II transport relief or not. Neither Windstream nor Sprint could possibly propound any theory under which a service subject to competition from a dozen or more facilities-based providers should remain subject to price cap regulation, and neither carrier makes any serious effort to do so. The fact that numerous competitive providers have built alternative networks covering the vast majority of BDS transport routes will ensure that ILECs respond with competitive rates and terms, and *ex ante* rate regulation of TDM transport services is both unnecessary and would discourage entry and investment.

Second, the *Draft Order*'s conclusion that cable companies' Ethernet services offered over their hybrid fiber coax ("HFC" or "EoHFC") facilities should be included as competition in its Competitive Market Test is also well-supported. The *Notice* itself acknowledges that "[p]acket-based BDS, including over HFC, is a good substitute for TDM BDS" and "place a constraint on TDM prices,"⁴ and the *Draft Order* correctly notes that EoHFC, like other BDS services, provides point-to-point wireline connections at symmetrical speeds.⁵ "Small and mid-sized businesses have been the bread and butter business target for cable operators from the start,"⁶ and cable companies have been aggressively rolling out EoHFC to cover much of their footprints. Upgrading HFC facilities to provide Ethernet services does not require replacing the wired cable infrastructure, but

³ Mark Israel, Daniel Rubinfeld & Glenn Woroch, Competitive Analysis of the FCC's Special Access Data Collection, *Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, at 22-23 (filed Jan. 27, 2016) ("IRW 1/27/16 White Paper").

⁴ Tariff Investigation Order and Further Notice of Proposed Rulemaking, *Business Data Services in an Internet Protocol Environment et al.*, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593, ¶ 160 (May 2, 2016) ("Notice"); see Comments of AT&T, *Business Data Services in an Internet Protocol Environment et al.*, WC Docket No. 16-143, 05-25, RM-10593, 4-5 (Jun. 28, 2016) ("AT&T June 28 Comments"); Reply Comments of AT&T Inc., *Business Data Services in an Internet Protocol Environment et al.*, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593, at 16-17 (Aug. 9, 2016) ("AT&T Aug. 9 Reply Comments"); see also Declaration of John Guillaume ¶ 16 ("Comcast is often bidding to replace legacy TDM (often DS-1) lines that provide lower bandwidth at a higher cost than Comcast's Ethernet-based services. Whereas adding capacity to a TDM-based network may take weeks and require pulling new cable, Comcast's fiber services can grow elastically along with a business's needs"), attached as Exhibit C to the Comments of Comcast Corp., *Business Data Services in an Internet Protocol Environment et al.*, WC Docket No. 16-143, 15-247, 05-25, RM-10593 (Jun. 28, 2016) ("Comcast June 28 Comments").

⁵ *Draft Order* ¶ 28.

⁶ Sean Buckley, "Comcast, Charter lead cable's challenge to telcos in the business sector," *Fierce Telecom* (Dec. 15, 2016), <http://www.fiercetelecom.com/telecom/comcast-charter-lead-cable-s-challenge-to-telcos-business-services-sector>.



Marlene H. Dortch
 April 13, 2017
 Page 3

merely upgrading the electronics. Cable providers can accomplish such upgrades quickly and inexpensively, and given the relative ubiquity of cable companies' fiber and HFC plant, cable providers' deployment of EoHFC has grown enormously over the past few years and will inevitably continue. Thus, cable companies can and do compete with incumbent and competitive BDS everywhere they have deployed their HFC networks. Indeed, as explained below, the record amply supports including cable "best efforts" services in the Competitive Market Test as well.

Third, the Commission's decision to grandfather all counties that have Phase II relief today is also correct. As explained below, customers today have negotiated arrangements based on MSAs, and any attempt to re-impose price caps on *counties* within MSAs that have Phase II relief would necessitate implementing adjustments to established billing that may have built-in volume discounts based on term plans. This change in account procedures just to account for a slightly smaller geography will create considerable confusion for customers and unnecessary billing and implementation expenses for the carriers.

Finally, AT&T takes the opportunity to respond to recent proposal submitted by Windstream⁷ which would freeze any tariffed rates for the duration of the contract irrespective of whether the contract contained any rate stability provisions. Verizon made a similar proposal.⁸ The Draft Order appropriately declines ordering the abrogation of any existing contracts.⁹ The Windstream and Verizon proposals would place the Commission in the position of re-negotiating the parties' contracts and should be rejected.

I. THE COMMISSION'S CONCLUSION THAT DS_n TRANSPORT SHOULD RECEIVE PHASE II RELIEF NATIONWIDE IS CORRECT.

The *Draft Order* correctly concludes that Phase II relief should be extended to all DS_n transport services. Contrary to the recent claims of Windstream and Sprint,¹⁰ the record confirms that competitive transport networks are now essentially ubiquitous. As the *Draft Order* notes, the data collection shows that, as of 2013, CLECs and cable companies had deployed fiber transport

⁷ Letter from John Nakahata (representing Windstream) to Marlene H. Dortch (FCC), *Business Data Services in an Internet Protocol Environment, et al.*, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593, dated April 11, 2017 ("Windstream 4/11 Letter").

⁸ Letter from Curtis L. Groves, Verizon, to Marlene H. Dortch (FCC), *Business Data Services in an Internet Protocol Environment, et al.*, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593, dated April 12, 2017 ("Verizon 4/12 Letter").

⁹ *Draft Order* at ¶ 163.

¹⁰ Windstream 3/27 Letter, at 24; Sprint 3/22 Letter, at 22-23.



Marlene H. Dortch

April 13, 2017

Page 4

networks within reach of the overwhelming majority of buildings with BDS demand.¹¹ These data are conservative, as the *Draft Order* notes, both because they include “only a subset of all hybrid fiber coax facilities deployed by cable providers (*i.e.*, only Metro-Ethernet headend-connected fiber feeder plant),” and because the data are from 2013 and thus miss the last four years of additional deployment by both cable companies and CLECs.¹²

Equally important, competitors have not only overbuilt the incumbents’ transport networks – they have overbuilt them *many times over*. In many large MSAs, more than *twenty* competitive providers have deployed competing fiber transport networks,¹³ and even smaller MSAs typically have more than a dozen separate competitive providers with fiber networks.¹⁴ This pattern of numerous competitive facilities-based transport providers occurs consistently whether the MSA has received Phase II transport relief or not.¹⁵ Moreover, as AT&T has previously shown, the CLECs have generally conceded that they have access to competitive transport facilities.¹⁶

¹¹ See *Draft Order* ¶ 89 (noting that “in all price cap territories, 92.1 percent of buildings served were within a half mile of competitive fiber transport facilities,” and “for all census blocks with business data services demand, 89.6 percent have at least one served building within a half mile of competitive LEC fiber”). Of course, the Commission’s calculations exclude cable best efforts services; if those are included, as they should be (*see* Section II, *infra*), then the record shows that for all MSAs competitive providers have deployed competing transport networks in more than 95 percent of census blocks with special access demand, representing almost 99 percent of business establishments. Mark Israel, Daniel Rubinfeld & Glenn Woroch, Competitive Analysis of the FCC’s Special Access Data Collection, *Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, at 20 (filed Jan. 27, 2016) (“IRW 1/27/16 White Paper”).

¹² *Draft Order* ¶ 89.

¹³ Letter from James P. Young (representing AT&T) to Marlene H. Dortch (FCC), *Business Data Services in an Internet Protocol Environment et al.*, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593, at 5 (Oct. 25, 2016) (“AT&T 10/25/16 *Ex Parte*”) (including table); *see also* *Draft Order* ¶ 77.

¹⁴ Examples include Birmingham, Alabama (14), Augusta, Georgia (17), Little Rock, Arkansas (12), Waco, Texas (12); San Diego, California (13), and South Bend, Indiana (14). Letter from Keith M. Krom (AT&T) to Marlene H. Dortch (FCC), *Business Data Services in an Internet Protocol Environment, et al.*, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593, at 3-4 (Nov. 10, 2016).

¹⁵ Examples include Anniston, Alabama (10), Vallejo/Fairfield, Napa, California (10), and Beaumont/Port Arthur, Texas (10), among many others.

¹⁶ See Letter from James P. Young and Christopher T. Shenk (representing AT&T) to Marlene H. Dortch (FCC), *Business Data Services in an Internet Protocol Environment et al.*, WC Docket Nos. 16-143, 05-25, 15-247, RM-10593, at 7-8 (Mar. 13, 2017) (“AT&T 3/13 Letter at 7-8”) (citing submissions from Level 3, XO, Windstream); Comments of Sprint Corp., *Business Data Services in an Internet Protocol Environment, et al.*, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593, at 6-11 (June 28, 2016) (“Sprint 6/28/16 Comments”); *see also* Reply Comments of Sprint Corp., *Business Data Services in an Internet Protocol Environment, et al.*, WC Docket Nos. 16-143, 15-247,



Marlene H. Dortch

April 13, 2017

Page 5

Accordingly, the data collection shows a marketplace in which multiple competitors have already built fiber transport networks that are almost coextensive with incumbent LEC interoffice transport networks. No party to this proceeding could possibly propound any theory under which a service that is generally subject to competition from a dozen or more facilities-based providers should remain subject to price cap regulation. To the contrary, as AT&T previously explained, the courts, the Commission, and the economic testimony here have all recognized that there can be no justification for price cap regulation when competitors have deployed sunk investment, because the presence of such investment ensures that ILEC prices will remain at just and reasonable levels.¹⁷

It should be no surprise that fiber transport networks are essentially ubiquitous today, because the economics of transport, particularly in the context of legacy TDM services, are

05-25, RM-10593, at 6 (Aug. 9, 2016) (“Sprint 8/9/16 Reply Comments”) (argument that “‘fiber presence equals competition’ . . . must be rejected [because] . . . significant barriers to entry prevent competitive carriers from deploying connection to most locations” (internal quotations omitted)). Sprint’s economic experts have also focused their economic analysis on how many competitors have constructed connections to individual locations. Declaration of William P. Zarakas and Susan M. Gately, ¶¶ 17-18 (“Zarakas/Gately 1/21/16 Decl.”), attached to Comments of Sprint Corp., *Special Access for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593 (Jan. 27, 2016) (“Sprint 1/27/16 Comments”); Declaration of Stanley M. Besen and Bridger M. Mitchel, ¶¶ 25-26 (“Basen/Mitchel 1/27/16 Decl.”), attached to Sprint 1/27/16 Comments; *see also* Further Supplemental Declaration of William P. Zarakas, ¶ 13 (“Zarakas 8/9/16 Decl.”), attached to Sprint 8/9/16 Reply Comments.

¹⁷ *See, e.g., WorldCom, Inc. v. FCC*, 238 F.3d 449, 458-59 (D.C. Cir. 2001) (“the presence of facilities-based competition with significant sunk investment makes exclusionary pricing behavior costly and highly unlikely to succeed,” because “that equipment remains available and capable of providing service in competition with the incumbent, even if the incumbent succeeds in driving that competitor from the market” (internal quotations omitted)); Fifth Report & Order & Further Notice of Proposed Rulemaking, *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers*, 14 FCC Rcd. 14221, ¶ 80 (1999) (“*Pricing Flexibility Order*”) (once a facilities-based competitor has “entered the market and cannot be driven out, rules to prevent exclusionary pricing behavior are no longer necessary”), *aff’d WorldCom, Inc.*, 238 F.3d at 458-59; *see also* Mark Israel, Daniel Rubinfeld, and Glenn Woroch, Competitive Analysis of the FCC’s Special Access Data Collection, *Special Access Rates for Price Cap Local Exchange Carriers et al.*, WC Docket No. 05-25, RM-10593, at 14 (Jan. 26, 2016) (“IRW First White Paper”); Mark Israel, Daniel Rubinfeld, and Glenn Woroch, Analysis of the Regressions and Other Data Relied Upon in the Business Data Services FNPRM And a Proposed Competitive Market Test: Second White Paper, *Business Data Services in an Internet Protocol Environment et al.*, WC Docket Nos. 16-143, 05-25, RM-10593, at 39-40 (Jun. 28, 2016) (“IRW Second White Paper”) (“As a matter of economics, price cap regulation is unnecessary and is, in fact, counterproductive in areas where rivals have deployed competing facilities-based networks.”); Mark Israel, Daniel Rubinfeld, and Glenn Woroch, Analysis of the Regressions and Other Data Relied Upon in the Business Data Services FNPRM And a Proposed Competitive Market Test: Third White Paper, *Business Data Services in an Internet Protocol Environment et al.*, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593, at 2 (Aug. 9, 2016) (“IRW Third White Paper”).



Marlene H. Dortch

April 13, 2017

Page 6

different from that of channel terminations. As the Commission found in the *Pricing Flexibility Order*, LECs treated TDM transport and customer loops as separate services and priced them differently, and that remains true today.¹⁸ The Commission also found that “[e]ntrance facilities, direct-trunked transport, channel mileage, and the flat-rated portion of tandem-switched transport all involve carrying traffic from one point of traffic concentration to another,” which meant that “entering the market for these services requires less investment per unit of traffic than is required, for example, for channel terminations between an end office and a customer premises.”¹⁹ The Commission thus believed that competitors would be likely to enter the market for transport services “before they enter the market for channel terminations.”²⁰ Indeed, even by the time the Commission adopted the *Pricing Flexibility Order* in 1999, competitors had already overbuilt much of the ILECs’ interoffice transport networks. Under these circumstances, ILECs were able to obtain Phase II relief for transport in many cities around the country in the early years of pricing flexibility, and ILECs and CLECs have been competing to provide facilities-based transport without *ex ante* rate regulation for more than a decade. Moreover, because the ILECs’ ability to receive additional transport relief to reflect new market entrants was frozen in 2012, the current Phase II relief grants do not reflect the extensive investment that competitors have made in transport networks over the last five years.

Windstream’s claim that transport should be deemed competitive only where CLECs are collocated in the price cap LEC’s central offices is fallacious.²¹ Competitors do not have to be able to accept *all* transport traffic in an area to provide competitive discipline. In counties in which competitors can accept the overwhelming majority of transport traffic on almost all routes, price

¹⁸ See *Access Charge Reform, et al.*, CC Docket No. 96-262, *et al.*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd. 14221, ¶ 10 (1999) (“*Pricing Flexibility Order*”) (“Charges for special access services generally are divided into channel termination charges and channel mileage charges. Channel termination charges recover the costs of facilities between the customer’s premises and the LEC end office . . . Channel mileage charges recover the costs of facilities (known as interoffice facilities) between the serving wire center and the LEC end office serving the end user”).

¹⁹ *Pricing Flexibility Order* ¶ 102; see also Order on Remand, *Unbundled Access to Network Elements*, 20 FCC Rcd. 2533, ¶ 72 (2005). (“transport facilities are not dedicated to a single customer . . . but rather carry numerous customers’ traffic. A competitive LEC therefore does not lose the sunk costs it has incurred to deploy transport when it loses a single customer, as it may in the case of a loop, if it does not acquire a new customer requesting similar services in the same location. With transport facilities, competitive LECs have some flexibility to replace a decrease in traffic. Thus, while there are significant sunk costs associated with transport deployment, there are greater opportunities for recovering sunk costs with transport than with loop facilities”).

²⁰ *Pricing Flexibility Order* ¶ 102; see also *id.* ¶¶ 103-104.

²¹ Windstream 3/27 Letter at 24-25. Windstream’s theory is that there may be some locations in an area that generate transport traffic that can only be reached from an ILEC central office, and thus collocation at the price cap LEC’s central office is needed to ensure that those locations can be reached by competitors. *Id.*



Marlene H. Dortch

April 13, 2017

Page 7

cap LECs must provide competitive mileage prices and terms to win that traffic, thus ensuring competitive outcomes.²² Nor is collocation the *sine qua non* of competition. To the contrary, the Commission itself in the *Pricing Flexibility Order* recognized that the mere “presence of competitive facilities within a wire center may well be the best evidence of irreversible investment.”²³ Since the Commission did not have that type of evidence in 1999 (and chose not to collect it because it would be “neither simple to administer nor easily verifiable”²⁴), the Commission used collocations instead as a proxy for existence of competitive fiber.²⁵ In this proceeding, the Commission has collected more comprehensive data showing the areas where competitors have deployed transport facilities – including detailed fiber maps – and, as noted, those data show that competitors have blanketed virtually every area where there is special access demand with competitive transport facilities, thus providing ample basis for granting nationwide Phase II pricing flexibility for transport services.

To be sure, as the *Draft Order* notes, there may remain “a relatively small percentage of census blocks (with an even smaller percentage of demand) price deregulated and without the immediate prospect of competitive transport options.”²⁶ The *Draft Order* properly notes, however, “greater harm—primarily manifested in the discouragement of competitive entry over time—would result if we were to attempt to regulate these cases than is expected under our deregulatory approach.”²⁷ Transport providers face “increasing demand” and “lower entry barriers” than for channel terminations, and thus Phase II relief will “provide incentives for competitive providers to deploy additional transport facilities to compete for this demand.”²⁸ Cable providers, in particular, already have nearly ubiquitous networks and are upgrading their facilities to provide Ethernet services, and they are poised to begin upgrading even their HFC facilities to “deliver symmetrical gigabit-speed broadband service, which will be enabled by CableLabs’ emerging Full

²² Even in an outlying area where CLECs may have not built transport all the way to the ILEC central office closest to a customer, CLECs nonetheless have transport facilities and networks that duplicate *most* of that ILEC’s interoffice transport network, and thus could still win most if not all of that transport business by accepting that traffic from a different hand-off point. Indeed, with the proliferation of extensive carrier-neutral facilities (such as carrier hotels and data centers), many competitive carriers use those locations today for network interconnection in which they accept transport traffic instead of maintaining collocation facilities within the ILEC serving wire centers.

²³ *Pricing Flexibility Order* ¶ 9.

²⁴ *Id.*

²⁵ *Id.* ¶¶ 148-149.

²⁶ *Draft Order* ¶ 90.

²⁷ *Id.*

²⁸ *Id.*



Marlene H. Dortch

April 13, 2017

Page 8

Duplex technology.”²⁹ In addition, as the *Draft Order* notes, any purported benefits from attempting to isolate and regulate the small portion of ILEC transport services that may not have a full CLEC substitute would not be worth the costs.³⁰ As explained above, pervasive CLEC transport networks will constrain ILEC *transport* pricing even if those competitive transport facilities are not perfectly coextensive with the ILEC’s facilities or legacy central offices, which reduces any need for intrusive, *ex ante* price cap regulation of ILEC transport services.³¹ In all events, the Section 208 complaint process will remain available in the unlikely event that an ILEC may charge unjust and unreasonable rates in such areas.³²

Finally, Sprint and Windstream claim that the Commission did not seek comment on competition in the DSn transport market, and thus the Commission cannot extend Phase II regulation to transport nationwide without a new round of notice and comment.³³ In fact, the *Notice* “propose[d] to abandon the collocation-based competition showings for channel terminations *and other dedicated transport services* for determining regulatory relief” and sought comment on a new “Competitive Market Test” that could be used to determine the extent to which

²⁹ Daniel Frankel, “Comcast’s Smit calls business services ‘\$25 billion’ opportunity, says Full Duplex coming in 24 months,” *Fierce Telecom* (March 7, 2017) (quoting Comcast Cable CEO Neil Smit saying “[w]e’ll get gigabit speed out of DOCSIS 3.1 rollout and then over the next 24 months, we’re going to do DOCSIS symmetrical—DOCSIS duplex,” and “will get symmetrical speeds, multi-gigabit speeds out into the network, leveraging our core HFC plant”); *see also* Letter from Matthew Brill, representing Comcast, to Marlene H. Dortch, FCC, dated February 26, 2017, at 1 (“We also noted that the dynamic and growing competition in the BDS marketplace militates against overbroad regulation of incumbent LECs’ TDM-based offerings, given that pervasive pricing controls are more likely to undercut than promote competition”); Letter from 100 Facilities-Based Competitive Providers to Marlene H. Dortch, FCC, dated August 29, 2016, at 1 (“competing facilities-based providers have invested, and are continuing to invest, billions of dollars in private capital to bring competition and its benefits to [the BDS] market. Because our companies have taken the risk to enter this marketplace (even in rural areas that have been bypassed by providers now advocating massive new regulation), commercial customers and carriers purchasing at wholesale now can access high-performance packet-based services in most areas of the country at prices that are substantially lower than those charged by the ILECs”).

³⁰ *Draft Order* ¶¶ 90-91.

³¹ *See also id.* ¶ 91 (“The alternative would be to impose significant regulatory burdens on all participants in the market with an additional layer of regulatory complexity that would undermine predictability and ultimately hinder investment, including in entry, and growth”).

³² *Id.*

³³ *See* Windstream 3/27 Letter at 24 (“the Commission did not propose any changes to the regulatory treatment of transport services separately from DS1 and DS3 channel terminations”); Sprint 3/22 Letter at 22-23 (Commission did not “s[ee] comment on the question of competition in the transport market,” and there is “no record on transport services,” and thus Commission cannot adopt a new policy on transport “without issuing an NPRM and gathering data”); *see also id.* at 28.



Marlene H. Dortch

April 13, 2017

Page 9

regulation for these services is necessary.³⁴ Further, the *Notice* points out that “[t]he Commission has traditionally applied the pricing flexibility competitive showings to two different BDS segments, channel termination and other dedicated transport services,” and recognizes the *Notice* “gives us the opportunity to re-evaluate the triggers and product markets used in the application of a competitive market test.”³⁵ Plus, the *Notice*’s proposed definition of “BDS” included DS_n transport services,³⁶ and the Commission “sought comment on this definition” and how services that satisfy this definition should be regulated.³⁷ Sprint itself obviously read the *Notice* as seeking comment on the proper test and rules for DS_n transport services, because in its initial comments it argued that the Commission should re-impose price caps on all DS_n transport services nationwide.³⁸

Windstream and Sprint also misconstrue AT&T’s prior statements that there is “little in the record addressing the competitiveness of transport services in BDS markets”³⁹ and that the *Notice* barely discusses dedicated transport.⁴⁰ These arguments take AT&T’s statements wholly out-of-context. In context, the quoted statements merely point out that there is no record evidence supporting nationwide (or any other) finding that transport is *not* competitive, particularly in the face of the record evidence demonstrating pervasive and intense competition for these services. And it was within this same context that AT&T pointed out that the Commission’s prior *Notices* did not cite any evidence supporting a possible expansion of regulation for transport, because the discussion of evidence in those notices was focused mainly on channel terminations.

³⁴ *Notice* ¶ 278.

³⁵ *Id.* ¶ 281.

³⁶ *Id.* ¶ 279.

³⁷ *Id.*; see also *id.* ¶¶ 281-82 (“[d]eveloping a new framework, however, gives us the opportunity to re-evaluate the triggers and product markets used in the application of a competitive test to ensure that they reflect technology transitions and the current market”).

³⁸ See Sprint 6/28/17 Comments at 40 (arguing that Commission should “ensur[e] that all TDM-based offerings at or below 50 Mbps, including those currently subject to Phase II pricing flexibility, are subject to an updated price cap regime”); see also *id.* at 17-21 (arguing that all BDS services at or below 50 Mbps are not competitive in the vast majority of cases and should be subject to price caps, and that the new Competitive Market Test should be applied only to services above 50 Mbps).

³⁹ Windstream 3/27 Letter, at 24; Sprint 3/22 Letter, at 22.

⁴⁰ AT&T 3/13 Letter, at 9.



Marlene H. Dortch
 April 13, 2017
 Page 10

II. THE COMMISSION’S COMPETITIVE MARKET TEST SHOULD COUNT BOTH CABLE ETHERNET OVER HFC AND BEST EFFORTS INTERNET ACCESS AS BDS COMPETITORS.

The *Draft Order* concludes that, for purposes of the Competitive Market Test, the Commission will count cable companies’ Ethernet services provided over their Hybrid Fiber Coax (“HFC”) facilities as BDS competition but not their “best efforts” Internet access services.⁴¹ Although the Commission correctly concludes that record evidence amply supports the inclusion of EoHFC, the record also compels the inclusion of “best efforts” services as well.

EoHFC. The Commission’s conclusion that Cable Ethernet provided over HFC should be included in the test is correct. The *Notice* itself acknowledges that “[p]acket-based BDS, including over HFC, is a good substitute for TDM BDS, so packet-based alternatives can place a constraint on TDM prices”⁴² As the *Draft Order* notes, EoHFC, like other BDS services, provides point-to-point wireline connections at symmetrical speeds,⁴³ and the record shows that such services can connect multiple sites and often include service level guarantees.⁴⁴ “Small and midsized businesses have been the bread and butter business target for cable operators from the start,”⁴⁵ and

⁴¹ *Draft Order* ¶¶ 27-31.

⁴² *Notice* ¶ 160 (May 2, 2016); see AT&T June 28 Comments at 4-5; AT&T Aug. 9 Reply Comments at 16-17; see also Comcast June 28 Comments, Guillaume Decl. ¶ 16 (“Comcast is often bidding to replace legacy TDM (often DS-1) lines that provide lower bandwidth at a higher cost than Comcast’s Ethernet-based services. Whereas adding capacity to a TDM-based network may take weeks and require pulling new cable, Comcast’s fiber services can grow elastically along with a business’s needs”).

⁴³ *Draft Order* ¶ 28.

⁴⁴ See, e.g., Cindy Whelan, Current Analysis, Comcast Takes Telework to the Next Level with Ethernet @Home, at 2 (Dec. 16, 2014) (Comcast’s Ethernet@Home is delivered over HFC, backed by SLAs, and is available for a variety of Ethernet services at symmetric bandwidth speeds up to 10 Mbps); Time Warner Cable Inc. Notice of Ex Parte Presentation, Special Access Rates for Price Cap Local Exchange Carriers, WC Docket No. 05-25, at 2-3 (filed Mar. 3, 2016) (emphases added) (“At the end of 2015, in response to customer demands, TWC introduced SLAs for its Ethernet-over-DOCSIS service, and has since seen [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL]”); Cox Business, Reliable, Secure, High-Speed Business Internet, https://www.cox.com/wcm/en/business/datasheet/ds-business-internet.pdf?campcode=x1_data_0908. See also AT&T March 21, 2016 ex parte at 10.

⁴⁵ Sean Buckley, “Comcast, Charter lead cable’s challenge to telcos in the business sector,” Fierce Telecom (December 15, 2016); see also *id.* (““On small business, I think it’s pretty evident by looking at the growth rates that cable is continuing to gain share pretty quick with bandwidth upgrades,” Atlantic-ACM’s Reed said. ‘I think that market is doing fairly well in general with bandwidth increases and cable continues to pick off broadband customers from the ILECs, especially in areas where telcos are not doing fiber.’”); *id.* (““Cable is rapidly increasing their portion of the market, especially on the low-speed Ethernet side,” [Atlantic-ACM] said . . . ‘we think on Ethernet over Coax



Marlene H. Dortch

April 13, 2017

Page 11

cable companies have been aggressively rolling out EoHFC to cover much of their footprints. Indeed, “[c]able operators of all sizes have found growing opportunities to take part in the lucrative and ever-evolving business services space,” because “[b]y nature, cable operators [have] . . . an embedded base of traditional hybrid fiber coax (HFC) cable that they can rapidly use to scale higher speed services and voice to local business customers.”⁴⁶

Upgrading HFC facilities to provide Ethernet services does not require replacing the wired cable infrastructure, but merely upgrading the electronics. Indeed, as one declarant explains, “[t]here generally is relatively little work or expense necessary to enable a DOCSIS 3.0 cable system with HFC facilities to provide Ethernet-over-HFC services.”⁴⁷ All DOCSIS systems have a cable modem termination system (CMTS) at the head-end,⁴⁸ which follow Cable Labs specifications and are available to all cable providers.⁴⁹ Cable Labs has developed Business Services over DOCSIS specifications for the CMTS and cable modems that “enable a DOCSIS Layer-2 Virtual Private Network (L2VPN) feature for Ethernet and other business services” and also facilitate service level agreements.⁵⁰ Accordingly, “if a cable operator wishes to provide Ethernet-over-HFC services over a DOCSIS 3.0 system, it need not replace the CMTS, though it may choose to add higher capacity cards, if necessary, to handle any additional capacity demands

that’s picking up in popularity,’ and ‘where the ILECs had the majority of share in the low speed space that’s starting to shift and we think that’s really driven prices down on the business data services space”).

⁴⁶ Sean Buckley, “Comcast, Charter lead cable’s challenge to telcos in the business sector,” *Fierce Telecom* (December 15, 2016); *see also id.* (“All of the largest and regional cable operators continue to find resonance with the SMB market, one that cable companies can readily address with higher speed services than what telcos can serve over copper-based DSL. What’s compelling for the cable operators is they can increase speeds rapidly over the existing HFC plant without having to necessarily deploy fiber”).

⁴⁷ Reply Comments of CenturyLink, Declaration of Michael Bugenhagen, at ¶ 4 (August 2016) (“Bugenhagen Decl.”).

⁴⁸ *Id.* (“[t]he CMTS is a specialized router that manages traffic flow and converts Internet Protocol (IP) into Ethernet via the RF channels that are used by the cable modems. This is similar to a DSLAM’s function in a DSL system, except that the DSLAM operates over a telephone copper pair, rather than a coaxial facility”).

⁴⁹ *Id.* *See also id.* (“DOCSIS elements are generally designed and tested by CableLabs, the cable industry’s research and development consortium, and available to all cable multiple-system operators (MSOs)”).

⁵⁰ *Id.* ¶ 5.



Marlene H. Dortch
 April 13, 2017
 Page 12

associated with the Ethernet services.”⁵¹ Replacing the electronics is a simple process that can be accomplished “in a matter of days, if not hours.”⁵²

Given the relatively low cost of the upgrades and the strong complementarities with their existing fiber-coax networks, it should not be surprising that EoHFC capabilities are inexorably expanding throughout cable company footprints. Indeed, cable companies today not only offer fiber-based Ethernet services throughout most urban areas using their fiber-based facilities, they also offer Ethernet services throughout most suburban and rural areas with BDS demand using EoHFC. Cox “confirms that [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL] of its headends” are capable of providing Metro Ethernet services over HFC, and that it offers SLAs with its Ethernet-over HFC product.⁵³ TWC has confirmed that “TWC’s Internet access service and Ethernet service are available across all TWC markets, and currently reach, without further construction, the [BEGIN HIGHLY CONFIDENTIAL] [END HIGHLY CONFIDENTIAL] of business locations within TWC’s footprint.”⁵⁴ TWC’s Ethernet-over-HFC service is also available with SLAs.⁵⁵ Comcast has also reported that a substantial portion of its headends support Ethernet-over-HFC, and that its Ethernet-over-HFC service includes SLAs relating to availability and speed.⁵⁶ Given the low barriers to upgrade existing HFC networks to provide EoHFC, and that cable companies are already aggressively pushing to make EoHFC available where BDS demand exists, it is appropriate for the Commission to take cable’s entire HFC networks into account when considering where BDS competition exists.

Indeed, “the cable industry is . . . the fastest growing provider segment of the Ethernet market,” especially for small business customers.⁵⁷ Charter’s fourth quarter commercial revenue

⁵¹ *Id.*

⁵² *Id.* As the declarant notes, cable operators “are already well accustomed to upgrading CMTS cards periodically, to keep up with growing bandwidth requirements of the cable modem services provided over their DOCSIS 3.0 systems.” *Id.*

⁵³ Letter from Michael H. Pryor (Cox Communications) to Marlene H. Dortch (FCC), *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, RM-10593 at 2 (filed May 18, 2016).

⁵⁴ Letter from Matthew A. Brill (TWC) to Marlene H. Dortch (FCC), *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, RM-10593 (filed Mar. 3, 2016).

⁵⁵ *Id.*

⁵⁶ See Letter from Matthew A. Brill (Comcast) to Marlene H. Dortch (FCC), *Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, RM-10593 (filed Mar. 25, 2016).

⁵⁷ Sean Buckley, “Comcast, Charter, and Altice’s aggressive builds, acquisitions advance cable’s Ethernet status, says VSG,” *Fierce Telecom* (March 29, 2017); see also Anna Marie Kovacs, “Business Data Services: Implications of the Rapid Growth of Cable Business Services,” at 2 (March 2017) (“Kovacs Paper”) (“Now that 2016



Marlene H. Dortch

April 13, 2017

Page 13

grew 11.8 percent to \$1.42 billion, with its small and medium business revenue increasing 13 percent.⁵⁸ Comcast recently bragged that “[i]n the small business segment, it’s about 70% of our revenue and 60% of our growth,” and it believes “we have about a 40% market share there, so there still a lot of room and opportunity there.”⁵⁹ Indeed, Comcast’s business services unit already “produces \$5.5 billion in annual revenue today,” and the company says “[w]e think that within the small and medium space it’s a \$20 [billion] to \$25 billion opportunity within our footprint.”⁶⁰ Comcast Business continues to expand its fiber network footprint into more markets, including places like Eastern Kansas City, Missouri, and Montgomery County, Maryland.⁶¹ Altice and Cox have also continued their own expansions in recent months. Altice acquired Lightpath and Suddenlink, giving it an “immediate large scale Ethernet footprint that operates over hybrid fiber coax (HFC) and fiber” in large cities like New York and many smaller markets as well.⁶² Cox recently purchased a large stake in Unite Private Networks (UPN), giving it access to 6,200 route mile fiber network that connects to 3,750 on-net buildings across 20 states, primarily in the central United States.⁶³ Regional cable companies, like Cable One and Mediacom, have also reported double-digit percentage increases in their small business BDS services.⁶⁴

“*Best Efforts.*” The record also confirms that cable HFC services, including “best efforts” services, compete against the DS1 and DS3 services at issue here.⁶⁵ Windstream and Sprint refer

financials have been reported, it is clear that cable is the fastest growing segment of business services and is very profitable”).

⁵⁸ *Id.*; see also Kovacs Paper at 3 (quoting Charter’s CEO saying “We have a fully distributed high-capacity network everywhere. We have 700,000 miles of infrastructure out in the streets and byways in front of 50 million homes and businesses”).

⁵⁹ Daniel Frankel, “Comcast’s Smit calls business services ‘\$25 billion’ opportunity, says Full Duplex coming in 24 months,” *Fierce Telecom* (March 7, 2017) (quoting Comcast Cable CEO Neil Smit).

⁶⁰ *Id.* (quoting Comcast Cable CEO Neil Smit).

⁶¹ Sean Buckley, “Comcast, Charter, and Altice’s aggressive builds, acquisitions advance cable’s Ethernet status, says VSG,” *Fierce Telecom* (March 29, 2017).

⁶² *Id.* (“[i]n the New York metro area, Lightpath’s fiber network spans more than 8,000 lit locations and 6,500 route miles. . . . Suddenlink also gives Altice network presence in key markets like Greenville, NC; Charleston, WV; Tyler, TX; and Lubbock, TX”).

⁶³ *Id.*

⁶⁴ Sean Buckley, “Comcast, Charter lead cable’s challenge to telcos in the business sector,” *Fierce Telecom* (December 15, 2016); see also *id.* (“The vast majority, or 90%, is SME [small and midsized enterprise],” said Tom Might, CEO of Cable One, during the recent UBS 44th Annual Global Media and Communications Conference. “When we did roadshow last year, we estimated we had a third market share in our markets for SME . . .”).

⁶⁵ See, e.g., Kovacs Paper at 6 (although cable best efforts services may not be identical to DS1s or DS3s, the cable companies’ high market share in the small- and medium-business market shows many businesses are willing to



Marlene H. Dortch

April 13, 2017

Page 14

mainly to self-serving statements they or others have made for the proposition that such services do not compete with DS1 and DS3 services.⁶⁶ The reality is that cable company “best efforts” services typically offer speeds of 100 Mbps or more, which *far* surpass the speeds available from legacy DS1 and DS3 services, and often at prices below those of legacy DS1 and DS3 services.⁶⁷ It is simply not credible to argue that customers do not cross-shop DS1/DS3 services against faster and less expensive best efforts services, which also often include service level agreements. In all events, the evidence shows that ILECs and CLECs have lost a significant number of lower-bandwidth customers to cable best efforts services.⁶⁸

substitute best-efforts cable services for those. . . . When the two largest cable companies in the U.S. have market shares in the small business market in the 35%-40% range, it is not rational to argue that their best-efforts service should not even be considered as competition to the ILEC TDM services that it is increasingly displacing”).

⁶⁶ Sprint 3/22 Letter at 15; Windstream 3/27 Letter at 11-15. Sprint and Windstream also point to a handful of statements made by cable companies. But when those statements were made, the Commission was threatening to regulate those services if cable companies admitted they were substitutes for BDS. Not surprisingly, some cable companies denied that their best efforts services were substitutes for DS1 and DS3 services.

⁶⁷ See, e.g., Kovacs Paper at 6 (“Comcast, for example, offers best-efforts Internet at \$69.95 for 16 mbps down and 3 mbps up. For customers who do not need service level guarantees, that is an attractive alternative to a T1 which offers only 1.5 mbps in each direction for prices beginning at \$179 or \$199”).

⁶⁸ USTelecom, for example, submitted a study showing that very large percentages of small and medium sized businesses consider cable best efforts services to be a substitute for legacy TDM-based services, and that many have indeed switched from legacy TDM-based services to best efforts cable services. See Letter from Diane Griffin Holland (USTelecom) to Marlene H. Dortch (FCC), WC Docket Nos. 16-143, 05-25, RM-10593 (Aug. 9, 2016) (attaching survey results). AT&T has shown that a very substantial portion of its competitive losses were to cable companies and a significant portion of those losses were to best efforts cable services. Reply Comments of AT&T Inc., *Special Access Rates for Price Cap Local Exchange Carriers, et al.*, WC Docket No. 05-25, RM-10593, at 26-27 (filed Feb. 19, 2016) (“AT&T 2/19/16 Reply”). CenturyLink reported that it competes against “best efforts services” offerings. Reply Comments of CenturyLink, *Special Access for Price Cap Local Exchange Carriers, et al.*, WC Docket No. 05-25, RM-10593, at 9-10 (filed Feb. 19, 2016) (“CenturyLink 2/19/16 Reply”). XO’s Director of Product Analytics has stated that XO is “regularly competing” against cable companies for small and medium sized businesses, that it “loses” such customers “to [cable] companies offering Best Efforts Internet.” Declaration of James A. Anderson, ¶ 33, attached to XO 1/27/16 Comments. Windstream’s website has advertised its “Ethernet Internet” service (with a 99.99% uptime guarantee) as a substitute for best efforts cable. See Windstream, Ethernet Internet, available at <http://www.windstreambusiness.com/products/enterprise-network-services/dedicated-internet-services/ethernet-internet>. And TDS has indicated that the vast majority of customers purchase lower-bandwidth services from TDS and that these customers have been “downgrading to best efforts broadband internet access services for cost savings.” Declaration of James Butman on Behalf of TDS Telecommunications Corp., ¶¶ 5, 15 (Butman 3/26/15 Decl.), attached to Letter from Thomas Jones (TDS) to Marlene H. Dortch (FCC), *Special Access for Price Cap Local Exchange Carriers, et al.*, WC Docket No. 05-25, RM-10593 (filed Mar. 26, 2015) (“TDS 3/26/15 Ex Parte”).



Marlene H. Dortch
 April 13, 2017
 Page 15

III. THE COMMISSION’S RULE GRANDFATHERING ALL COUNTIES THAT CURRENTLY HAVE PHASE II RELIEF IS A REASONABLE AND WELL-SUPPORTED MEASURE THAT WILL AVOID UNNECESSARY COSTS AND BURDENS.

AT&T supports the Commission’s proposal to grandfather those counties that currently have Phase II relief but would not otherwise satisfy the Commission’s competitive market test.⁶⁹ The *Draft Order* states that “only 98 counties in former Phase II pricing areas are deemed non-competitive pursuant to our competitive market test, and these counties collectively have only [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] buildings with demand for end user channel terminations (only a portion of which is for DS1s or DS3s).”⁷⁰ This level of demand – and the undisputed fact that customers are increasingly abandoning legacy TDM technologies for Ethernet services⁷¹ – would not justify expending the time and resources that would be involved in reinstituting price caps in those areas.

As the *Draft Order* highlights, many of these current Phase II areas have been operating without price cap regulation for years and trying to reapply price cap regulation would involve billing and system changes.⁷² For example, when these areas originally received Phase II relief, all of the affected services were moved to pricing flexibility – across the entire MSA. Peeling back discrete counties involves a level of granularity – and complexity – that has not been considered before. Moreover, from a customer perspective, reapplying price cap regulation to those areas that currently have Phase II relief will likely result in customer confusion and complaints. Many customers currently are parties to multi-year pricing flexibility term contracts that extend across entire MSAs. Absent the proposed grandfathering, some portion of this demand would have to be ‘surgically’ moved out of the pricing flexibility regime back into the price cap

⁶⁹ See proposed draft Rule 69.801(d) “*Grandfathered market*. A county that does not satisfy the competitive market test set forth in § 69.803 for which a price cap local exchange carrier obtained Phase II relief pursuant to § 69.711(c).”

⁷⁰ *Draft Order* at ¶ 174.

⁷¹ AT&T lost more than [BEGIN HIGHLY CONFIDENTIAL] [REDACTED] [END HIGHLY CONFIDENTIAL] percent of its DS1 business from non-affiliates just between January 2013 and October 2015. Declaration of Paul Reid ¶ 18 (“Reid 1/8/16 Decl.”), attached to Brief of AT&T Inc. in Support of Its Direct Case, *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*, WC Docket No. 15-247 (Jan. 8, 2016).

⁷² *Draft Order* at ¶ 174 (“Incumbent LECs in these counties have been providing DS1 and DS3 end user channel terminations free of price cap regulation for a number of years and have adapted their internal systems accordingly. Bringing these services back into price caps would require that incumbent LECs revamp their billing, information technology, and third-party management systems, at significant cost.”).



Marlene H. Dortch

April 13, 2017

Page 16

regime. Administering this demand going forward and ensuring the appropriate billing structure is applied would be a logistical nightmare for *both* providers and customers. Such disruptive changes would not serve any business purpose as these account for a very small amount of demand, but would be necessary solely to comply with a regulatory edict – and all for DS_n services that will likely be retired altogether early in the next decade.

Beyond all this, re-imposition of price caps in these counties would require the Commission to surmount a host of legal hurdles. In order to invoke its authority to regulate competition and to impose new rate regulation under Sections 201 and 202, the Commission would have to clearly demonstrate that there is a market failure that requires a regulatory solution.⁷³ That would require the Commission to make an affirmative showing that the ILECs' current rates are unjust and unreasonable – *i.e.*, completely outside the zone of reasonableness – whether price caps technically constitute a prescription or not. Indeed, the Commission has acknowledged that even to impose interim special access rate prescriptions, the “record would have to support the conclusion that *every* . . . rate [and practice for] *every* service for which pricing flexibility [or forbearance] has been granted violates Section 201.”⁷⁴ But even if the Commission were to make such predicate findings for these services, it would still face the daunting task of figuring out how to reimplement a price cap regime.⁷⁵ “[R]einstituting price cap regulation would require the carrier to recreate what the price cap would be had it never received pricing flexibility for the counties at

⁷³ See, e.g., Tentative Decision and Request for Further Comments, *Amendment of 47 C.F.R. § 73.658(j)(1)(i) and (ii), the Syndication and Financial Interest Rules*, 94 FCC 2d 1019, ¶ 107 (1983) (acknowledging that the Commission “should not intervene in the market except where there is evidence of a market failure and a regulatory solution is available that is likely to improve the net welfare of the consuming public, *i.e.*, does not impose greater costs than the evil it is intended to remedy”); Memorandum Opinion and Order, *Orloff v. Vodafone Airtouch Licenses LLC*, 17 FCC Rcd. 8987, ¶ 22 n.69 (2002) (absent a marketplace failure the Commission generally “rel[ies] on market forces, rather than regulation”); Second Report and Order, *Implementation of Sections 3(n) and 332 of the Communications Act*, 9 FCC Rcd. 1411, ¶ 173 (1994) (“[I]n a competitive market, market forces are generally sufficient to ensure the lawfulness of . . . terms and conditions of service set by carriers who lack market power”); *Cellco P’ship v. FCC*, 357 F.3d 88, 96 (D.C. Cir. 2004) (the Commission may adopt regulations only “upon finding that they advance a legitimate regulatory objective”). See also Comments of AT&T Inc., *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593 (Jan. 27, 2016) at 21-23; Reply Comments of AT&T, Inc., WC Docket No. 05-25, RM-10593 at 31-34 (Feb. 19, 2016).

⁷⁴ Brief for Federal Communications Commission, *In re AT&T Corp., et al.*, No. 03-1397, 2004 WL 1895955, at *23-24 (D.C. Cir. filed Aug. 23, 2004) (emphasis in original).

⁷⁵ See Comments of AT&T Inc., *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593 (Jan. 27, 2016) at 21-23; Reply Comments of AT&T, Inc., WC Docket No. 05-25, RM-10593 at 31-34 (Feb. 19, 2016).



Marlene H. Dortch
 April 13, 2017
 Page 17

issue, which would involve burdensome and complicated calculations.”⁷⁶ The services at issue here thus have not been subject to any rate regulation for many years – in the case of some DS services, almost 15 years. Under these circumstances, resuscitating a regulatory regime specifically to address areas with minimal or no special access demand provides no real benefit.⁷⁷

IV. THE PARTIES SHOULD REMAIN BOUND BY THE TERMS AND CONDITIONS OF THEIR RESPECTIVE CONTRACTS.

With regard to Windstream’s request that the Commission clarify Paragraph 163, AT&T has no issue with clarifications that ensure that existing terms and conditions not be abrogated as a result of detariffing. Therefore, AT&T believes that the following clarifications from Windstream (with the one additional suggestion of replacing the word “disturb” with “void”) may in fact clarify the Commission’s intent:

We do not intend our actions to ~~disturb~~ void existing contractual or other long-term arrangements, including contract tariffs, term and volume tariff discount plans, and individual circuit plans.

Thus, for example, if a tariff rate plan has a provision stating that the current rate on the circuit commitment will not increase even if the underlying tariff rates increase, but would decrease if such tariff rate decreases, the ILEC should remain bound to that commitment for services subject to that plan. AT&T in fact offers several tariff plans with language of that sort.

AT&T also would be supportive of Windstream’s clarification to add the underlined phrase to Rule § 1.776:

Such contract-based tariffs may not be extended, renewed or revised, except that any extension or renewal expressly provided for by the contract-based tariff may be exercised pursuant to the terms thereof.

However, AT&T objects to the following additional edits Windstream proposes to Paragraph 163:

Moreover, for long-term arrangements under which the rates for the TDM services are not contained in the long-term arrangement, in order to preserve the contractual

⁷⁶ *Draft Order* ¶ 174.

⁷⁷ *Cf. Draft Order* ¶ 174 (“We find that the costs of reinstituting price caps in these counties outweigh the potential benefits.”).



Marlene H. Dortch
 April 13, 2017
 Page 18

expectation that prevailed prior to this Order, such rates should be frozen as of the effective date of this Report and Order and continuing through the expiration of the long-term arrangement.⁷⁸

This language (as well as Verizon’s proposal) goes far beyond any claimed contractual expectations, as it effectively gives the non-ILEC party greater rights and benefits than it has now. When contract tariffs or other long-term arrangements were negotiated, the customer and the ILEC negotiated and mutually agreed to the terms and conditions of those arrangements.⁷⁹ If a BDS rate or other term or condition is not explicitly set forth in the contract tariff or other arrangement, the parties did not negotiate and agree to ‘freeze’ those rates, terms and conditions, so the BDS services remained subject to possible changes in the BDS service rates and other terms and conditions that are set forth in the generally available tariffs. Those understandings and expectations of both parties should not change because of the movement away from tariffs. AT&T has entered into price flex agreements that fix rates or contain rate stability provisions as well as those that do not. The Commission should not accept the invitations of Windstream and Verizon to “re-negotiate” mutually agreed-upon arrangements by regulatory fiat and grant parties an extra benefit that the contract tariff or other arrangement did not provide or one that the parties did not negotiate to include in the first instance.

Moreover, the predictions of industry disruption are unanchored from marketplace realities and experience. The Draft Order is not the first time the Commission has granted regulatory relief involving detariffing and historically the industry has proven that it can implement such relief. For example, as part of the broadband transmission services forbearance rulings, the Commission preconditioned its forbearance relief on the mandatory detariffing of the services.⁸⁰ The result was that the tariffed terms and conditions moved to guidebooks or the like, usually with minimal if any substantive changes, and all without noticeable disruption. Similar to the present circumstances,

⁷⁸ Windstream 4/11 Letter at 3. Verizon has offered a similar proposal: “To promote contract stability and to avoid unnecessary market disruption, we propose[] the Commission specify in its Order that if a contract tariff refers to or incorporates tariffed rates, terms, and conditions for special-access services, those rates, terms, and conditions in effect immediately before detariffing should continue to apply to the provision of the services for the remaining term of the contract, unless the parties’ contract specifies otherwise.” Verizon 4/12 Letter.

⁷⁹ Furthermore, the contracts tariffs and other long term arrangements were entered into with the backdrop of this decade-long proceeding and the prospect that changes to the terms and conditions for BDS would be required.

⁸⁰ See e.g., Memorandum Opinion and Order, *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to its Broadband Services*, 22 FCC Rcd. 18705, ¶ 42 (2007).



Marlene H. Dortch
April 13, 2017
Page 19

when the contract tariffs were detariffed, if contracts contained rate stability provisions they remained in effect.

The Windstream and Verizon requests for special treatment should be rejected.

Very truly yours,

/s/ James P. Young
James P. Young
Christopher T. Shenk
Sidley Austin LLP

Counsel for AT&T